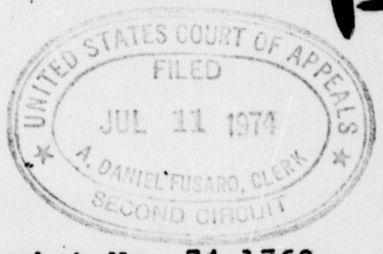
United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1760 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



UNITED STATES OF AMERICA,

Appellee,

-against-

EDWARD PRAVATO,

Appellant.

Docket No. 74-1760

P/S

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Whether the search of appellant's suitcase on the consent of a third party with no apparent authority to consent was valid.

2. Whether the District Court's erroneous instruction that counsel had stipulated to elements of the crime requires reversal.

3. Whether imposition of concurrent sentences requires modification of the judgment.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Edward R. Neaher) rendered May 31, 1974, after a trial before a jury, convicting appellant of bank robbery and robbery while armed (18 U.S.C. §2113(a) and (d)), and sentencing him to twenty years on each count, the terms to run concurrently with each other and with a sentence appellant was then serving.*

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant and Salvatore Polisi were indicted for bank robbery and bank robbery while armed.** Prior to trial, counsel made a motion to suppress evidence consisting of a piece of paper with the words "Sal's father" and a telephone

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*The prior sentence was for a bank robbery conviction with eight years left to be served on the term.

**The indictment is annexed as "B" to appellant's separate appendix. A third count, for conspiracy, was subsequently dismissed.

number written on it. The paper had been found in a search of appellant's suitcase which, according to the FBI agent, was found open (181*). The suitcase was found in the home of Mrs. Joan Syracuse, on a bed in a guest room which appellant occupied with Mrs. Syracuse's permission. Mrs. Syracuse consented to the search of the room (178-80, 187-88), but there is no indication in the record that appellant consented to the search of the suitcase, nor was he present at the time.**

The agent did not recall whether he observed men's or women's clothing in the room. No information was elicited concerning Mrs. Syracuse's method of entry into the room (192). The agents did not believe anyone other than Mrs. Syracuse was in the house (203) at the time of the search.

Judge Neaher denied the motion to suppress, holding that, on the authority of United States v. Mattlock, 42 U.S.L.W. 4252 (Sup.Ct. February 20, 1974), Mrs. Syracuse could properly authorize a search of the room.***

At the trial, Mrs. Barth and Elizabeth Albert, both tellers at the bank (280, 379), and Mrs. Callegari,

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*Numerals in parentheses refer to pages of the trial transcript.

**Appellant had been arrested in Buffalo, New York, and at the time of the search was en route to FBI Headquarters in downtown Buffalo (189).

***Judge Neaher's oral opinion is annexed as "D" to appellant's separate appendix.

the bookkeeper (362), identified appellant as one of the men involved in the bank robbery on May 3, 1971.

Mrs. Barth testified that the taller man, later identified as co-defendant Polisi, came over to her and, with her help, opened the teller's drawer. The man took money from the drawer and put the money into a yellow plastic bag (289).

Appellant, whom Mrs. Barth described as the shorter man (286), then came to her holding a gun and a bag (312) in his left hand. Appellant opened another drawer and removed money from it (290). Mrs. Barth specifically testified that appellant's gun was not pointed at her (290), but she said she was distressed (292). After appellant took the money, Mrs. Barth lay down on the floor (314) to get out of the way (315), although no one told her to do so (314).

Mrs. Barth was shown the surveillance films taken by the bank cameras to enable the Government to introduce these photographs into evidence. She was asked if the photos represented the shorter man involved in the robbery. To this question Mrs. Barth responded affirmatively (295), and the photographs were introduced (296).

Mrs. Callegari, the bookkeeper, testified that for five seconds (370) she saw two men, a taller man and a shorter man, as they entered the bank. The shorter man was wearing a handkerchief around his neck and was carrying a gun.

Mrs. Callegari saw his face. She identified appellant Pravato as the shorter man (366).

The second teller, Mrs. Albert (379), testified that Pravato (385)* came toward her with a gun pointed at her and told her to lie down on the floor. She "was in a state of shock" and "scared" (383).

It was stipulated that the bank was insured by the Federal Deposit Insurance Corporation (445), that about $25,000 had been taken (446), and that the surveillance films, which had been introduced into evidence, had been taken by the activation of a bank camera and removed from it on May 3, 1971.

The Government sought to introduce the piece of paper seized on January 19, 1974 (531), from Pravato's suitcase in a room in Buffalo, New York. Both counsel objected on "the same grounds as earlier" (527). The objection was overruled and the paper admitted. It read: "Sal" or "Sol father 561-665 5979." An FBI agent testified that appellant had acknowledged that the paper was his (538). It was stipulated that the telephone number was listed to Frank Polisi, Salvatore Polisi's father (493).

In his charge to the jury,** Judge Neaher gave

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*At trial, Pravato was wearing a pink shirt (see 449-50), and Mrs. Albert identified the man in the pink shirt as the robber.

**The full charge is annexed as "C" to appellant's separate appendix.

the following instruction:

> Now, in this case there appears to be no real dispute that the Franklin National Bank was robbed on May 3, 1971. As I said before, its deposits were insured by the Federal Deposit Insurance Company. And it is also stipulated, as I understand it, that a substantial sum, approximately $25,000 which was in the bank's care and custody, was taken from employees of the bank by the use of force, violence and intimidation, and that at least three employees were put in jeopardy when a dangerous weapon was used with respect to them.
>
> (604).

After deliberation, the jury found appellant guilty. He was sentenced to twenty years' imprisonment for robbery and robbery while armed, the terms to run concurrently.

ARGUMENT

Point I

THE SEARCH OF APPELLANT'S SUITCASE AND THE SEIZURE OF EVIDENCE FROM IT WAS UNLAWFUL.

The Government's witness at the suppression hearing testified that he sought entry into the home of Mrs. Joan Syracuse and, with her consent, searched the bedroom which appellant was using as a guest. On the bed in that room the agents found an open suitcase belonging to appellant. From it the agents took several pieces of paper, one of which was subsequently introduced into evidence. Judge Neaher ruled that the admission of the paper into evidence was proper because Mrs. Syracuse had authority to permit a search of her guest's room.

It is generally accepted that where the right to occupancy by one person is equal or superior to that of another, the former's consent to search is sufficient. United States v. Mattlock, 42 U.S.L.W. 4252, 4253 (Sup.Ct. February 20, 1974); United States v. Ellis, 461 F.2d 962, 967-68 (2d Cir. 1972). In this case, that principle required suppression of the evidence. Although Mrs Syracuse might have had authority to permit a search of the room, she had no authority to consent to a search of the suitcase. There is no indication on the record which would permit the agents

to have believed that Mrs. Syracuse had such authority. The agents knew that appellant was a guest in Mrs. Syracuse's home, that he was using that particular bedroom, and, from observation, it was apparent that Mrs. Syracuse had no connection with appellant's effects, either actual (see Schneckloth v. Bustamonte, 412 U.S. 218, 245 (1973); Frazier v. Cupp, 394 U.S. 731, 740 (1969)), or apparent (see United States v. Robinson, 479 F.2d 303 (7th Cir. 1973); White v. United States, 444 F.2d 724 (10th Cir. 1971)).

Although the suitcase was open, there is no indication on the record that the paper taken from it was in plain view, and almost certainly the contents of the writing could not have been. Thus, in order to recognize its evidentiary value, the agents must have removed it from the suitcase and examined it. Contrast United States v. Novick, 450 F.2d 1111 (9th Cir. 1971), cert. denied, 405 U.S. 995 (1972). Under these circumstances, the search and seizure was unlawful. Nugent v. United States, 409 U.S. 1065 (1972) (opinion dissenting from an order denying a petition for writ of certiorari).

Since Mrs. Syracuse was without authority to consent to a search of the suitcase, and since the evidence was not in plain view, the search was unlawful. The evidence obtained was also prejudicial, for it was physical evidence of a connection between appellant and Polisi which corroborated the Government's other evidence.

Point II

REMOVAL FROM THE JURY'S CONSIDERATION OF CERTAIN ELEMENTS OF THE CRIME BY THE JUDGE'S INCORRECT STATEMENT THAT COUNSEL HAD STIPULATED TO THOSE ELEMENTS REQUIRES REVERSAL OF THE JUDGMENT.

In his charge to the jurors, Judge Neaher told them that it had been stipulated that force, violence, and intimidation had been used to obtain the money, and that three employees of the bank had been put in jeopardy. However, there was no such stipulation by the parties here. The stipulation of the attorneys was limited to the jurisdictional element of insurance, the amount of money taken in the robbery, and the removal and custody of the bank surveillance film (see Court's Exhibit #1).*

By improperly charging the jurors that the critical elements of force and assault or danger were acknowledged by the defense, the court removed from the jurors' consideration a critical element of each count of the indictment. Thus, the court deprived appellant of the right to have the jury find each element of the crime beyond a reasonable doubt.

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*There was also a second, unrelated, stipulation concerning Frank Polisi's telephone number and address.

Although there was no objection taken to this part of the charge, it is clearly substantial error. It has the same effect as failing to instruct the jurors as to those elements of the crime, for in both instances the jurors are precluded from making an evaluation of the evidence to determine whether there was proof beyond a reasonable doubt. See Screws v. United States, 325 U.S. 91 (1945); United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Fields, 466 F.2d 119 (2d Cir. 1972).

Point III

THE COURT WAS WITHOUT AUTHORITY TO IMPOSE TWO SENTENCES FOR VIOLATION OF §2113(a) and §2113(d).

The court imposed concurrent twenty-year sentences for violation of §2113(a) and §2113(d). Although the sentences were made to run concurrently, it was permissible to impose a sentence only for violation of §2113(d) (United States v. Marshall, 427 F.2d 434, 435 n.2 (2d Cir. 1970)), or, at most, one sentence to cover all the counts (Gorman v. United States, 456 F.2d 1258 (2d Cir. 1972)).

Accordingly, the judgment must be modified so that it is in conformity with the principles of sentencing.

CONCLUSION

For the above-stated reasons, the judgment of the District Court must be reversed and a new trial granted.

Respectfully submitted,

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July 11, 1974

Certificate of Service

July 11 , 19 74

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

E. Thomas Boyle